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COMMENTS

A "UNIFORM" EDUCATION: REFORM OF LOCAL PROPERTY TAX SCHOOL FINANCE SYSTEMS THROUGH STATE CONSTITUTIONS

In *San Antonio Independent School District v. Rodriguez*,¹ the United States Supreme Court was faced with a state school financing system which could "fairly be described as chaotic and unjust."² Nonetheless, the Court refused to interfere with the Texas funding system challenged in that case. The *Rodriguez* decision virtually eliminated the federal courts as a means for bringing about more equitable school financing systems in the United States. However, the Court concluded the otherwise timid opinion by pointing out that "this Court's action today is not to be viewed as placing its judicial imprimatur on the status quo. The need is apparent for reform in tax systems which may well have relied too long and too heavily on the local property tax."³

Consequently, in the absence of legislative action, the task of dealing with this recognized need for reform fell upon the state courts. To some extent this is due to the fact that while the federal Constitution makes no reference to education, nearly all of the state constitutions specifically refer to the state's duty to provide education.⁴ The Wisconsin Constitution is one of those that contains such an "education clause": "The legislature shall provide by law for the establishment of district schools, which shall be as nearly uniform as practicable"⁵

1. 411 U.S. 1 (1973).

2. *Id.* at 59 (Stewart, J., concurring).

3. 411 U.S. at 58.

4. Levin, *Editor's Introduction to the State Studies*, 38 LAW & CONTEMP. PROB. 309, 310 (1974).

5. The full text of the Wisconsin Constitution's education clause reads as follows: The legislature shall provide by law for the establishment of district schools, which shall be as nearly uniform as practicable; and such schools shall be free and without charge for tuition to all children between the ages of 4 and 20 years; and no sectarian instruction shall be allowed therein; but the legislature by law may, for the purpose of religious instruction outside the district schools, authorize the release of students during regular school hours.

Wis. CONST. art. X, § 3.

The goal embodied in the clause is clear — equal education for all Wisconsin children. However, this goal cannot be accomplished without a fair and equal method of funding the state's schools. This comment will examine the past and potential impact of Wisconsin's education clause on the state's system of educational financing. First, however, the financing system itself will be reviewed.

I. THE FINANCING PROBLEM IN WISCONSIN

Although there are several different forms of state educational financing,⁶ the vast majority of states still delegate a large portion of the financing responsibility to local school districts, which, in turn, rely heavily on the local property tax.⁷ In the 1974-1975 school year in Wisconsin, more than 58 percent of the cost of education was paid for with revenue generated by the local property tax.⁸ The national average is approximately 55 percent.⁹ This reliance on local funds is the cause of many of the problems of the present school financing system.¹⁰

6. There are three basic types of school financing systems: (1) foundation plans, (2) flat grant systems and (3) percentage-equalizing plans. Under a foundation plan the state guarantees that if the local district will tax itself at a specified minimum level the district will have available a specified number of dollars per pupil. A state utilizing a flat grant system distributes an absolute number of dollars per pupil to each district. Probably the most fair in theory, percentage-equalizing plans allow the districts to set their own budgets and the state simply supports the individual districts in inverse proportion to their taxable wealth. Coons, Clune & Sugarman, *Educational Opportunity: A Workable Constitutional Test for State Financial Structures*, 57 CALIF. L. REV. 305, 313-16 (1969) [hereinafter cited as Coons, Clune & Sugarman].

7. Hawaii is the only state which provides full state funding for its schools. Porter, Rodriguez, *The "Poor" and the Burger Court: A Prudent Prognosis*, 29 BAYLOR L. REV. 199, 200 (1977) [hereinafter cited as Porter].

8. Wisconsin Education Association Council, Position Statement to Governor's Commission on State-Local Relation and Financing Policy, at 8 (April 1976) (unpublished report) [hereinafter cited as Position Statement].

9. Porter, *supra* note 7, at 200. Most of the balance is provided by the state and federal governments. As a general rule, however, federal aid for local education is relatively small. See Timpane, *Reform Through Congress, Federal Aid to Schools: Its Limited Future*, 38 LAW & CONTEMP. PROB. 493 (1974). In 1971, the federal government contributed only 3.3% of the annual cost of education in the state of Wisconsin. 43 Wisconsin Taxpayer No. 2, Wisconsin Taxpayer's Alliance, at 2 (Feb. 1975) [hereinafter cited as 43 Wisconsin Taxpayer No. 2].

10. See generally Silard & Goldstein, *Toward Abolition of Local Funding in Public Education*, 3 J. L. & EDUC. 307 (1974); Note, *Texas School Finance: The Incompatibility of Property Taxation and Quality Education*, 56 TEX. L. REV. 253 (1978) [hereinafter cited as *Texas School Finance*].

A. *Wealth Disparities*

Local financing puts schools in poorer districts at a serious disadvantage. There are significant differences in wealth among the various school districts. For example, in the Milwaukee metropolitan area for the 1977-1978 school year property wealth per pupil ranged from \$361,812 in the wealthiest school district to \$51,042 in the poorest, a ratio of 7 to 1.¹¹ Comparable figures on a statewide basis for the 1974-1975 school year reveal a ratio of approximately 10 to 1.¹² Thus, significant disparities exist in the property wealth of school districts throughout the state.

Although the property tax revenue available for funding education in a given district depends upon the tax rate as well as the district's property wealth,¹³ there are practical limitations on the rate at which school districts can tax. The recent taxpayer revolt demonstrates that the public either cannot or will not tolerate increases in the property tax after a certain point. Wisconsin, along with several other states, has already considered measures to limit local property taxation.¹⁴

This problem is aggravated by the fact that residents of poorer school districts are less likely to be able to afford any greater tax burden. Consequently, fiscal choice is often no more than a "cruel illusion for the poor school districts."¹⁵

11. Marcuvitz, *The Litigation Approach to Effect Reform Through Revision of Wisconsin's System of Financing Public School Education*, at 22-23 (Nov., 1978) (an unpublished report submitted to the Milwaukee Common Council advocating greater funds for municipal areas) (citing 66 Government Research Bureau Bulletin No.7, Citizens Governmental Research Bureau (May 1978)) [hereinafter cited as Marcuvitz].

12. *Id.* See also Hansen, *An Evaluation of the 1973 Wisconsin School Finance Reform* (Nov., 1977) (unpublished report) [hereinafter cited as Hansen]. Excluding the wealthiest five percent and the poorest five percent of the districts, the disparity ratio was still nearly 3 to 1. Marcuvitz, *supra* note 11, at 23.

13. *Cf.* Wis. STAT. § 120.10 (1975) (authorizing local school districts to choose their own tax rate).

14. See, e.g., Wall St.J., Oct. 31, 1978, at 1, col. 6; Wall St.J., June 19, 1978, at 1, col. 4; Wall St.J., June 1, 1978, at 9, col. 1. While taxpayers seem outraged by government spending in general, it seems more than coincidental that they have lashed out most often and most vehemently against the local property tax. Among the states which have recently considered measures to lower or limit property taxes are California, Idaho, Michigan, Nevada, Oregon, Texas and Wisconsin. Wall St.J., Oct. 31, 1978, at 1, col. 6. For a discussion of a proposal to limit local property taxes in Milwaukee, Wisconsin, to 2% of assessed valuation, see Milwaukee J., Aug. 12, 1978, at 2, col. 1.

15. *Serrano v. Priest*, 5 Cal. 3d 584, 611, 487 P.2d 1241, 1260, 96 Cal. Rptr. 601, 620 (1971). See also *Board of Educ., Levittown Union Free High School Dist. v. Nyquist*, 94 Misc. 2d 466, —, 408 N.Y.S.2d 606, 620-24 (Sup. Ct. 1978).

Even some school districts with relatively high property valuation are unable to devote more of their property tax revenue to education. Cities, for example, must spend comparatively more for noneducational purposes such as fire, police and other municipal services. Additionally, the cost of providing education is often higher in cities, both because of higher construction and labor costs and because large cities often "have the most difficult and the most expensive school populations in the state to educate."¹⁶ Thus, although the school district in Wisconsin's major city, Milwaukee, has a significantly higher property tax rate than the surrounding communities, it spends less in proportion to its total property wealth on education.¹⁷

B. Spending Disparities

Unequal distribution of property tax revenues available for education within a state naturally results in spending disparities among its school districts. Shortly before the *Rodriguez* decision, the ratios in the various states between the largest and smallest amounts spent on education per pupil in each state's school districts averaged about 3 or 4 to 1.¹⁸ More recently, the political pressure for property tax relief has often had the effect of reducing the funds available for education.¹⁹ Furthermore, state aid designed to offset wealth imbalances is often "inadequate to offset the inequalities inherent in a fi-

16. The Milwaukee school district spends only 47% of its tax revenues on education and its property tax rate is \$41.36 per thousand dollars of assessed value. This means that only \$19.44 is spent on education for every thousand dollars of assessed valuation. The property tax rate in the neighboring Shorewood school district is only \$35.44 per thousand dollars of assessed valuation. However, the eleven school districts in the two counties neighboring Milwaukee can afford to spend on the average 64% of their tax revenues on education. Marcuvitz, *supra* note 11, at 29-30; see Milwaukee J., Apr. 15, 1979, at 10, col. 1. The same is true of the municipalities of Detroit and Boston. See Porter, *supra* note 7, at 207.

17. See Marcuvitz, *supra* note 11, at 29-30.

18. Levin, *Alternatives to the Present Systems of School Finance: Their Problems and Prospects*, 61 GEO. L.J. 879, 883 (1973) [hereinafter cited as Levin, *Alternatives*]. See also Berke & Callahan, *Serrano v. Priest: Millstone or Milestone for School Finance*, 21 J. PUB. EDUC. 23, 33 (1972).

19. Wall St. J., June 1, 1978, at 9, col. 1. Schools in Wisconsin have been closed recently in order to conserve scarce education funds. Milwaukee J., July 30, 1978, at 1, col. 5 (part II). Ohio is the most blatant example, where, in 1977, fifteen school districts ran out of funds. Wall St. J., June 1, 1978, at 9, col. 1.

nancing system based on widely varying local tax bases."²⁰

In Wisconsin, which has had an active state-funded assistance program, the ratio between the highest and lowest per-pupil expenditures was approximately 2 to 1 for the 1977-1978 school year. Even within the Milwaukee area, per-pupil expenditures ranged from \$1,625 to \$2,853 among the various school districts during the 1977-1978 school year.²¹

There is evidence that these spending differentials in Wisconsin have resulted in qualitative differences in the education provided in the various districts.²² While one court has simply concluded that "differences in dollars do produce differences in pupil achievement,"²³ there is some academic disagreement as to whether this is always true. Most of the dispute centers around a 1966 empirical study which found that there was no necessary correlation between greater expenditures for quality staff, books, and other educational inputs and results on standardized tests.²⁴ The Supreme Court explained its judicial timidity in the *Rodriguez* case by noting that even on "the most basic questions in this area the scholars and educational experts are divided."²⁵

However, Justice Marshall's dissent in *Rodriguez* suggested that "the question of discrimination in educational quality must be deemed to be an objective one that looks to what the State provides its children, not to what children are able to do with what they receive."²⁶ Courts nationwide have had little trouble finding a positive correlation between spending and the breadth, variety and quality of educational opportunity.²⁷ Al-

20. *Serrano v. Priest*, 5 Cal. 3d 584, 594, 487 P.2d 1241, 1248, 96 Cal. Rptr. 601, 608 (1971).

21. Marcuvitz, *supra* note 11, at 24.

22. See Position Statement, *supra* note 8, at 8.

23. *Serrano v. Priest*, 18 Cal. 3d 728, 748, 557 P.2d 929, 939, 135 Cal. Rptr. 345, 355 (1976), *cert. denied*, 432 U.S. 907 (1978).

24. OFFICE OF EDUC., U.S. DEPT. OF HEALTH, EDUC., AND WELFARE, EQUALITY OF EDUCATIONAL OPPORTUNITY (1966) [hereinafter cited as Coleman Report]. See also McDermott & Klein, *The Cost-Quality Debate in School Finance Litigation: Do Dollars Make a Difference?* 38 LAW & CONTEMP. PROB. 415 (1974); Schoettle, *The Equal Protection Clause in Public Education*, 71 COLUM. L. REV. 1355, 1378-83 (1971).

25. 411 U.S. at 42 n.86.

26. 411 U.S. at 84 (Marshall, J., dissenting).

27. See, e.g., *Horton v. Meskill*, 172 Conn. 615, —, 376 A.2d 359, 370 (1977); *Robinson v. Cahill*, 62 N.J. 473, 514, 303 A.2d 273, 295 (1973), *cert. denied*, 414 U.S. 976 (1975); *Board of Educ., Levittown Union Free High School Dist. v. Nyquist*, 94 Misc. 2d 466, —, 408 N.Y.S.2d 606, 620 (Sup. Ct. 1978).

though more academic research may be necessary to refute the 1966 findings that expenditures and student performance may not be related, common sense suggests that the quality of education is greatly affected by the level of educational expenditures. Thus, funding disparities can constitute a serious threat to equal education.

Although Wisconsin is not the worst state in the nation in this regard, the amount of education funds available per pupil varies substantially from district to district in this state. The remainder of this comment will examine the impact that the Wisconsin education clause has or could have on this problem.

II. IMPACT OF EDUCATION CLAUSES IN OTHER STATES

The Wisconsin clause provides that district schools "be as nearly uniform as practicable" ²⁸ As with other constitutional guarantees, such as "due process of law," this Wisconsin constitutional provision is subject to a great deal of interpretation. Consequently, judicial interpretations, in other states, of similar or comparable clauses could be very important in defining the potential scope of the Wisconsin provision.

The courts of several other states have used their state's education clause to strike down unfair educational financing systems. Some courts have applied the education clauses directly in finding their state's financing system in violation of the state constitution. Other courts have reached the same result by applying equal protection guarantees with increased rigor in accordance with the greater emphasis placed on education by the education clause in their state constitution.

A. Direct Application

The first case to apply a state constitution education clause to the school financing problem was *Robinson v. Cahill*. ²⁹ It was conceded in that case that the amount spent per pupil varied from district to district under the New Jersey system and that state aid had not compensated for the "practical limitations" on local tax bases. Therefore, in an opinion issued just two weeks after the United States Supreme Court refused to get involved in the educational funding issue in the *Rodriguez*

28. WIS. CONST. art. X, § 3.

29. 62 N.J. 473, 303 A.2d 273 (1973), cert. denied, 414 U.S. 976 (1975).

case, the New Jersey Supreme Court struck down its state's school financing system as a violation of the New Jersey education clause.³⁰

The New Jersey clause stated: "The legislature shall provide for the maintenance and support of a thorough and efficient system of free public schools for the instruction of all the children in this state between the ages of five and eighteen years."³¹ Although this clause is obviously different from the Wisconsin education clause, there are several aspects of the *Robinson* court's analysis that could be significant in interpreting the Wisconsin provision.

First, the court concluded that the "ultimate responsibility for a thorough and efficient education was imposed upon the State" by the New Jersey clause.³² Thus, the state government had the duty to provide the education that "the Constitution commands," either by compelling legal districts to act or by meeting the obligation itself.³³

In determining what was required by the nebulous constitutional phrase "thorough and efficient system of free public schools," the court had little legislative history to guide it.³⁴ Nonetheless, the court concluded that "we do not doubt that an equal educational opportunity was precisely in mind."³⁵ The court even noted that "[u]pon the record before us it may be doubted that the thorough and efficient system of schools required by the [education clause] can realistically be met by reliance upon local taxation."³⁶ In any event, the then-existing

30. *Id.* at 517, 303 A.2d at 298. See also Tractenberg, *Reforming School Finance Through State Constitutions: Robinson v. Cahill Points the Way*, 27 RUTGERS L. REV. 365 (1973) [hereinafter cited as Tractenberg].

31. N.J. CONST. art. VIII, § 4.

32. 62 N.J. at 508, 303 A.2d at 291.

33. *Id.* at 513, 303 A.2d at 294.

34. *Id.* at 507-13, 303 A.2d at 290-94.

35. *Id.* at 513, 303 A.2d at 294.

36. *Id.* at 516, 303 A.2d at 297. But the court carefully construed the education clause so as not to bar all delegation of financial responsibility to local districts. *Id.* at 517, 303 A.2d at 298. See also Board of Educ., Levittown Union Free School Dist. v. Nyquist, 94 Misc. 2d 466, 408 N.Y.S.2d 606 (Sup. Ct. 1978):

[I]t is not the fact that, in attempting to fulfill the constitutional obligation, the State has delegated taxing responsibility to school districts which offends the Education Article. Rather, it is the fact that such delegation has been made without adequate recognition of the varying capabilities of districts to raise educational funds through taxes levied on disparate real property tax bases and the failure of the State to correct disparities in the availability of locally-raised

New Jersey school financing system did not satisfy the requirements of the state's constitution. Thus, the New Jersey court was willing to read an equal educational opportunity requirement into the New Jersey clause,³⁷ which is less susceptible to that interpretation than the "as uniform as practicable" language of the Wisconsin Constitution.

In *Seattle School District Number One v. State of Washington*³⁸ the Washington Supreme Court found that the state had failed to meet its obligation under the state education clause by requiring local districts to raise revenues through nonmandatory and irregular special excess levies.³⁹ A failure by voters to approve excess levies in their districts left 40 percent of the students within the state without needed additional revenues.

The court based its decision on article IX, section 1 of the Washington Constitution, which provides that "[i]t is the paramount duty of the state to make ample provision for the education of all children residing within its borders,"⁴⁰ rather than on section 2, which commands the legislature to "provide for a general and uniform system of public schools."⁴¹ By forcing local districts to depend on local referenda contingent upon voter approval and local property wealth, the legislature failed to discharge its "paramount duty" to make "ample provision" for education; the strong directive of section 1 could be satisfied only if sufficient funds were supplied through regular and

educational funds by providing state aid sufficient to discharge its primary obligation.

Id. at ____, 408 N.Y.S.2d at 640.

37. *Id.* *Robinson* was followed in *Board of Educ., Levittown Union Free School Dist. v. Nyquist*, 94 Misc. 2d 466, 408 N.Y.S.2d 606 (Sup. Ct. 1978), where a New York trial court found the state's financing scheme, which provided equalization aid coupled with a minimum (flat grant) guarantee to be violative of the New York constitutional mandate that the legislature establish "a system of free common schools." *Id.*

38. 90 Wash. 2d 476, 585 P.2d 71 (1978).

39. *Id.* at ____, 585 P.2d at 78. There were several reasons why special excess levies were considered an undependable source of funds: (1) school districts had no independent authority to raise funds; (2) approval of special levies was dependent completely upon the whim of the electorate; (3) authorizing referenda were not scheduled at a regular time of the year, but instead had to be called by the individual districts at their own expense; (4) a substantial percentage of the funds required to operate schools were provided by these levies; and (5) the levies were dependent upon the assessed valuation of taxable real property within a district. *Id.* at ____, 585 P.2d at 98-99.

40. WASH. CONST. art. 9, § 1.

41. WASH. CONST. art. 9, § 2.

dependable sources.⁴²

The court's reliance on section 1 rather than section 2, which is comparable to Wisconsin's "uniform as practicable" clause, may make the reasoning of the case inapposite in Wisconsin. Indeed, the Washington Supreme Court found that the strong language of section 1 supported the conclusion that "[n]o other state has placed the common school on so high a pedestal."⁴³ A concurring justice, however, determined that both sections were "equally explicit" and thus concluded that, taken together, the clauses

contemplate an educational system in which, to the extent practical through statewide planning and financial support, each child is afforded an equal opportunity to learn, regardless of differences in his or her family and community resources. The system of local levy financing challenged here is an anathema to the egalitarian promise of these provisions, violating them in both letter and spirit.⁴⁴

Uniformity language, then, can arguably have an egalitarian goal which may be violated by excessive reliance on the local property tax.

There are state cases which have held to the contrary, however. In *Thompson v. Engelking*,⁴⁵ the Idaho Supreme Court refused to find the Idaho system of financing unconstitutional under an education clause mandating a "uniform and thorough" system of schools.⁴⁶ Under the Idaho system, each district had available from the state "essentially" the same base amount of funds per pupil. However, to raise necessary additional funds, the local districts levied property taxes. As a result of the "variation in assessed valuation per pupil in Idaho

42. 90 Wash. 2d at ____, 585 P.2d at 98. What sources of tax revenue were "regular and dependable" was left in doubt. However, the court ruled out the existent system's unmitigated reliance on local property wealth, stating:

Further, the levy system's instability is demonstrated by the special excess levy's dependence upon the assessed valuation of taxable real property, within a district. Some districts have substantially higher real property valuations than others thus making it easier for them to raise funds. Such variations provide neither a dependable nor regular source of revenue for meeting the state's obligation.

Id. at ____, 585 P.2d at 98-99.

43. *Id.* at ____, 585 P.2d at 91.

44. *Id.* at ____, 585 P.2d at 109 (Utley, J., concurring).

45. 96 Idaho 793, 537 P.2d 635 (1975).

46. IDAHO CONST. art. 9, § 1.

school districts" the amount produced per mill levy by the individual districts varied "greatly."⁴⁷ The Idaho Supreme Court, reluctant to intrude into the legislative area of equal educational opportunity, found that the education clause only guaranteed that financing could not be left to the complete discretion of localities; expenditures in individual districts, however, could vary with district wealth.⁴⁸

Admittedly, the court's rationale in *Thompson* does not support a broad reading of Wisconsin's uniformity language.⁴⁹ The case itself illustrates the considerable latitude a court has in construing a provision like "uniformity." While to some, the language has egalitarian import, to others it is only a minimal guarantee. The uncertainty of construction is compounded by the fact that each state court's determination may depend largely upon the "constitutional and legislative history" of each state's respective education clause.⁵⁰ The overriding factor, however, may be the individual court's proclivity for judicial activism.

B. Equal Protection

Early attempts to invalidate school financing systems relied primarily on equal protection challenges. The California Supreme Court set the pace in *Serrano v. Priest*⁵¹ and other courts have followed suit, employing similar rationales.⁵² Although these initial cases were based on the fourteenth amendment, the Supreme Court's decision in *Rodriguez* has forced courts to rely on state equal protection provisions. The early results, however, have been consistent with the reasoning of *Serrano*.

47. 96 Idaho at ____, 537 P.2d at 640.

48. *Id.* at ____, 537 P.2d at 651-52.

49. *Cf. Olsen v. State*, 276 Ore. 9, ____, 554 P.2d 139, 148 (1976) (where the Oregon Supreme Court flatly refused to interpret the "uniform and general" clause to require each district's educational expenditures to "approach" equality).

50. *Id.*

51. 5 Cal. 3d 584, 487 P.2d 1241, 96 Cal. Rptr. 601 (1971).

52. *See, e.g., Van Dusartz v. Hatfield*, 334 F. Supp. 870 (D. Minn. 1971); *San Antonio Independent School Dist. v. Rodriguez*, 337 F. Supp. 280 (W.D. Tex. 1971), *rev'd*, 411 U.S. 1 (1973). The immediate force of the *Serrano* arguments was felt nationwide: "School finance laws in Texas, Minnesota, Kansas, New Jersey, Arizona, and Michigan were struck down in rapid succession and challenges to similar laws were brought in more than 30 other states. Only courts in New York and Indiana sustained their respective school finance statutes." Tractenberg, *supra* note 30, at 370-71 (footnotes omitted).

In *Serrano* the California Supreme Court relied on traditional two-tiered equal protection analysis⁵³ to strike down a financing scheme based on the local property tax.⁵⁴ In determining whether wealth was a suspect classification, the court noted that the effect of California's reliance on the local property tax was to make the assessed valuation of property within any district "the major determinant of educational expenditures."⁵⁵ The court found that

[a]lthough the amount of money raised locally is also a function of the rate at which the residents of a district are willing to tax themselves, as a practical matter districts with small tax bases simply cannot levy taxes at a rate sufficient to produce the revenue that more affluent districts reap with minimal tax efforts.⁵⁶

Considerable intrastate wealth disparities, with concomitant differences in per-pupil expenditures, existed in California at the time of *Serrano*.⁵⁷ Wealth was, therefore, considered to be a "capricious and irrelevant factor" which was suspect when introduced into state legislation.⁵⁸

53. If the challenged legislation impinges upon a fundamental right or uses a suspect classification, the reviewing court will apply strict judicial scrutiny. To withstand strict scrutiny, the state must show that the legislation is necessary to achieve a compelling state interest. On the other hand, if neither a suspect class nor a fundamental right is found, the courts apply the traditional rational basis test. In such a case, the legislative classification need only bear a rational relationship to a valid state interest to be upheld. The analysis under the rational basis test is often no more than a deferential stamp of judicial approval, with courts assuming valid state interests. Thus, the early case law was faced squarely with the question of whether wealth was a suspect class, and whether education was a fundamental right. See generally Gunther, *The Supreme Court, 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1 (1972). See also *Developments in the Law, Equal Protection*, 82 HARV. L. REV. 1065 (1969).

54. *Serrano v. Priest*, 5 Cal. 3d 584, 597-601, 487 P.2d 1241, 1250-53, 96 Cal. Rptr. 601, 610-13 (1971).

55. *Id.* at 598, 487 P.2d at 1250, 96 Cal. Rptr. at 610.

56. *Id.*

57. 5 Cal. 3d at 593, 487 P.2d at 1247, 96 Cal. Rptr. at 607. For example, in 1969-70, Baldwin Unified School District spent \$577 to educate each of its pupils, while wealthier Pasadena spent \$840 and Beverly Hills \$1232 per pupil. *Id.* at 594, 487 P.2d at 1248, 96 Cal. Rptr. at 608.

58. *Id.* at 597, 487 P.2d at 1250, 96 Cal. Rptr. at 610 (citing *Harper v. Virginia State Bd. of Educ.*, 383 U.S. 663 (1966)). The defendants in *Serrano* argued that there was no constitutional infirmity because of the absence of purposeful or intentional discrimination. Defendants claimed that any discrimination was de facto rather than de jure. In rejecting the necessity for finding intent, the court noted that "numerous cases

The California court also found education to be fundamental since it was a "major determinant" of social and economic success in today's competitive society and had a "unique influence" on a person's development as a citizen and political being.⁵⁹ Not only was education the "sine qua non of useful

involving racial classifications have rejected the contention that purposeful discrimination is a prerequisite to establishing a violation of the equal protection clause." 487 P.2d at 1254 n.18 (citing *Hobson v. Hansen*, 269 F. Supp. 401, 497 (D.D.C. 1967)).

The question of intent may be more difficult in light of recent Supreme Court cases necessitating such a finding in race cases. In *Washington v. Davis*, the Court held that a racially discriminatory purpose is critical in making out an equal protection violation. 426 U.S. 229, 241-42 (1976). *But cf.* *Dayton Bd. of Educ. v. Brinkman*, 99 S. Ct. 2971 (1979) (finding impact and foreseeable consequences sufficient to show intent).

The requirement of intentional or de jure discrimination has apparently been limited to race cases. Thus, that requirement should not affect the application of equal protection to other areas such as school finance law. Moreover, the requirement of de jure classification, while arguably justifiable in the race area, makes no sense in wealth cases. As was explained in Michelman, *The Supreme Court, 1968 Term—Foreword: On Protecting the Poor Through the Fourteenth Amendment*, 83 HARV. L. REV. 7, 27-28 (1969):

The trouble is that, unlike a de facto racial classification which usually must seek its justifications in purposes completely distinct from its race-related impacts, a de facto pecuniary classification typically carries a highly persuasive justification inseparable from the very effect which excites antipathy — *i.e.*, the hard choices it forces upon the financially straitened. For the typical form assumed by such a classification is simply the charging of a price, reasonably approximating cost, for some good or service which the complaining person may freely choose to purchase or not to purchase. A de facto pecuniary classification, that is, is usually nothing more or less than the making of a market (*e.g.*, in trial transcripts) or the failure to relieve someone of the vicissitudes of market pricing (*e.g.*, for appellate legal services). But the risk of exposure to markets and their "decisions" is not normally deemed objectionable, to say the least, in our society. Not only do we not inveigh generally against unequal distribution of income or full-cost pricing for most goods. We usually regard it as both the fairest and most efficient arrangement to require each consumer to pay the full market price of what he consumes, limiting his consumption to what his income permits. Exceptions, of course, exist. The point is precisely that such "commodities" as a vote, an effective defense to criminal prosecution, perhaps education, conceivably some others, are exceptional, and that the exceptions depend on the special qualities of the excepted commodities.

It is difficult to perceive a purpose to discriminate when the right to education is equally available to everyone who has an equal ability to pay for it, but unequally available to those who do not. Because of the precious importance of education, it is necessary to apply equal protection in a more pervasive, less economically-objective manner.

59. 5 Cal. 3d at 605, 487 P.2d at 1255-56, 96 Cal. Rptr. at 615-16. The California court quoted *Brown v. Board of Educ.*, 347 U.S. 483, 493 (1954), for the classic recitation of education's importance:

"Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for

existence," it was also vital for the preservation of a free and meaningful democratic society.⁶⁰

Since both a suspect classification and a fundamental right were involved, California's financing system was subjected to strict scrutiny.⁶¹ The state attempted to justify the system by claiming that local fiscal control was an essential aspect of educational growth. The California court made short shrift of that argument, stating that

so long as the assessed valuation within a district's boundaries is a major determinant of how much it can spend for its schools, only a district with a large tax base will be truly able to decide how much it really cares about education. Far from being necessary to promote local fiscal choice, the present financing system actually deprives the less wealthy districts of that option.⁶²

The necessary result of the court's analysis was a finding that local fiscal choice was not a compelling state interest. Thus, the California financing system failed to survive strict scrutiny under equal protection analysis.⁶³

The United States Supreme Court, however, refused to follow the *Serrano* lead in the *Rodriguez* decision.⁶⁴ Although the Texas property tax system resulted in glaring intrastate spending disparities which were "primarily attributable to differences in the amount of assessable property within any district,"⁶⁵ the Court refused to find wealth to be a suspect classification⁶⁶ and also rejected the argument that education, because

education both demonstrate our recognition of the importance of education to our own democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms."

5 Cal. 3d at 606, 487 P.2d at 1256-57, 96 Cal. Rptr. at 616-17.

60. 5 Cal. 3d at 606, 487 P.2d at 1257, 96 Cal. Rptr. at 617 (quoting *Manjeres v. Newton*, 64 Cal. 2d 365, 375-76, 411 P.2d 901, 908, 49 Cal. Rptr. 805, 812-13 (1966)).

61. *Id.* at 614, 487 P.2d at 1263, 96 Cal. Rptr. at 623.

62. *Id.* at 611, 487 P.2d at 1260, 96 Cal. Rptr. at 620.

63. *Id.* at 614, 487 P.2d at 1263, 96 Cal. Rptr. at 623.

64. 411 U.S. 1, 46 (1973).

65. *Id.* at 24 (footnotes omitted).

66. *Id.* at 26.

of its critical importance to the individual and to society, should be deemed fundamental.⁶⁷ Education, no matter what its social importance, was not considered fundamental because it was not "explicitly or implicitly guaranteed by the Constitution."⁶⁸ The Court's reluctance to characterize wealth as a suspect class and education as a fundamental right resulted in a ruling sustaining the constitutionality of the Texas system under the rational basis test.⁶⁹

67. *Id.* at 35. Appellees in *Rodriguez* argued that education should be deemed fundamental because of the nexus between quality education and effective exercise of first amendment freedoms and the right to vote. The Supreme Court rejected the argument, claiming that they "have never presumed to possess either ability or the authority to guarantee to the citizenry the most effective speech, or the most informed electoral choice." *Id.* at 35-36. Compare the language of the Washington Supreme Court in *Seattle School Dist. No. 1 v. State of Wash.*, 90 Wash. 2d 476, 585 P.2d 71 (1978):

Education plays a critical role in a free society. It must prepare our children to participate intelligently and effectively in our open political system to insure that system's survival. It must prepare them to exercise their First Amendment freedoms both as sources and receivers of information; and it must prepare them to be able to inquire, to study, to evaluate and to gain maturity and understanding.

Id. at ____, 585 P.2d at 94 (citations omitted).

68. 411 U.S. at 55.

69. *Id.* Ostensibly, the Court justified its restraint by concluding that the class allegedly discriminated against "could not be identified or defined in customary equal protection terms" *Id.* at 19. They were unable to classify those discriminated against as (1) poor persons whose income fell below some identifiable level of poverty; (2) those relatively poorer than others or (3) all those who, irrespective of their personal incomes, happen to reside in a relatively poorer school district. *Id.* at 19-20.

The difficulty in classification arose primarily from proof problems. There was an insufficient showing, for example, that the wealthy were clustered in property-rich districts, and that wealthy districts spend more on education. According to the Court, appellees' suit asked it "to extend its most exacting scrutiny to review a system that allegedly discriminates against a large, diverse, and amorphous class, unified only by the common fact of residence in districts that happen to have less taxable wealth than other districts." *Id.* at 28.

Furthermore, even given proper characterization of appellees as "poor," the Court was not convinced that more dollars meant better educational opportunities. The results of the Coleman Report, *supra* note 24, — that no correlation existed between cost and quality — justified judicial restraint. The Court could not intervene when even on "the most basic questions in this area, the scholars and educational experts are divided." *Id.* at 42-43. See text accompanying note 24 *supra*. See also McDermott & Klein, *supra* note 24, at 405. State courts which have struck down their respective systems have generally rejected the Supreme Court's finding of fact. The different findings can be traced in part to more sufficient proof, but also in part to judicial assertiveness. In *Horton v. Meskill*, for example, the fact that the wealthy do not always live in property-rich districts was not controlling; it was sufficient that victims of educational inopportunity were generally unified in districts with "relatively low assessable property values." 172 Conn. 615, ____, 376 A.2d 359, 373 (1977).

Although the deference shown by the Supreme Court in *Rodriguez* impeded reform by upholding a grossly inequitable system of financing education, the decision may increase reliance on state constitutional provisions. The Court's requirement that a right be "explicitly or implicitly guaranteed by the Constitution" in order to be fundamental, may very well provide the basis for strong challenges under state equal protection clauses. Since most state constitutions contain education clauses, the logical conclusion is that education is a fundamental right for state constitutional purposes and that strict scrutiny is the appropriate standard of review. This conclusion has been substantiated by cases decided since *Rodriguez*.⁷⁰

Additionally, state court decisions have been in accord with a New York trial court's assertion that there is "a direct, positive and significant correlation between property values and expenditures. That is, the wealthier a district in property value, the more it spends per pupil; the poorer the district, the less it spends." *Board of Educ., Levittown Union Free School Dist. v. Nyquist*, 94 Misc. 2d 466, ___, 408 N.Y.S.2d 606, 617 (Sup. Ct. 1978). See also *Serrano v. Priest*, 18 Cal. 3d at 746, 557 P.2d at 938, 135 Cal. Rptr. at 354; *Horton v. Meskill*, 172 Conn. at ___, 376 A.2d at 367; *Robinson v. Cahill*, 62 N.J. at ___, 303 A.2d at 295. In Wisconsin, a recent study of school districts in the Milwaukee metropolitan area reveals a direct relationship between wealth and expenditures. Marcuvitz, *supra* note 11, at 24-25.

Most importantly, the state courts rejected the Supreme Court's cost-quality argument. The state courts closely scrutinized dollar expenditure disparities, and generally found that dollars do make a difference in class size, professional staff, curriculum offerings, services available to pupils, and the availability of equipment and supplies. *Serrano v. Priest*, 18 Cal. 3d at 748, 557 P.2d at 939, 135 Cal. Rptr. at 355; *Horton v. Meskill*, 172 Conn. at ___, 376 A.2d at 368; *Robinson v. Cahill*, 62 N.J. at ___, 303 A.2d at 271; *Board of Educ., Levittown Union Free High School Dist. v. Nyquist*, 94 Misc. 2d at ___, 408 N.Y.S.2d at 637.

The Supreme Court in *Rodriguez* had suggested that these physical advantages did not necessarily translate into greater pupil achievement. The California Supreme Court categorically rejected that contention asserting that "differences in dollars do produce differences in pupil achievement." *Serrano v. Priest*, 18 Cal. 3d at 748, 557 P.2d at 939, 135 Cal. Rptr. at 355. The other state courts, however, did not rely upon the question of pupil achievement to the same extent; acknowledging that experts disagreed on the issue, they found an adequate basis for decision in the fact that disparities in the breadth, quality and variety of educational opportunity resulted from dollar differences. *Horton v. Meskill*, 172 Conn. at ___, 376 A.2d at 374; *Robinson v. Cahill*, 62 N.J. at ___, 303 A.2d at 277; *Board of Educ., Levittown Union Free High School Dist. v. Nyquist*, 94 Misc. 2d at ___, 408 N.Y.S.2d at 618-19; *Seattle School Dist. No. 1 v. State of Wash.*, 90 Wash. 2d at ___, 585 P.2d at 98. The wealthier districts, therefore, were found by the state courts to have a constitutionally identifiable advantage.

70. *Serrano v. Priest*, 18 Cal. 3d 728, 557 P.2d 929, 135 Cal. Rptr. 345 (1976), *cert. denied*, 432 U.S. 907 (1978); *Horton v. Meskill*, 172 Conn. 615, 376 A.2d 359 (1977); *Board of Educ., Levittown Union Free High School Dist. v. Nyquist*, 94 Misc. 2d 466, 408 N.Y.S.2d 606 (Sup. Ct. 1978) (applying an intermediate level of scrutiny). See also

In the second *Serrano v. Priest*⁷¹ decision, the California Supreme Court declared that the state equal protection clause had sufficient "independent vitality" to avoid the impact of *Rodriguez*.⁷² The court merely referred to a footnote in *Serrano I* which stated that the federal and state clauses were substantially identical and then asserted that its earlier analysis of the federal provision was equally applicable to the state provision.⁷³ *Serrano*, then, remains a landmark for state constitutional challenges.

More recently, in *Horton v. Meskill*,⁷⁴ the Connecticut Supreme Court relied on state equal protection analysis to invalidate a financing system⁷⁵ which had resulted in disparate spending due to excessive reliance on the local property tax and inadequate state aid.⁷⁶ After considering a number of factors—including physical plant and student test scores⁷⁷—the

Thompson v. Engelking, 96 Idaho 793, ___, 537 P.2d 635, 646 (1975); Olsen v. State, 276 Ore. 9, ___, 554 P.2d 139, 144 (1976) (where the supreme courts of Oregon and Idaho refused to apply the "explicitly or implicitly guaranteed" test and rejected the fundamental - nonfundamental distinction in upholding their respective financing systems); Shofstall v. Hollins, 110 Ariz. 88, ___, 515 P.2d 590, 592 (1973) (where the Arizona Supreme Court found education to be fundamental, but applied a rational basis test in upholding its system).

71. 18 Cal. 3d 728, 557 P.2d 929, 135 Cal. Rptr. 345 (1976), cert. denied, 432 U.S. 907 (1978). The first *Serrano* opinion reversed a trial court decision to dismiss the complaint. *Serrano v. Priest*, 5 Cal. 3d 584, 96 Cal. Rptr. 601, 487 P.2d 1241 (1971). The second *Serrano* opinion was an appeal on the merits of a trial court decision holding the California system of finance unconstitutional.

During the trial proceedings, the United States Supreme Court decided *San Antonio Independent School Dist. v. Rodriguez*. The state in *Serrano II*, therefore, argued that the wrong standard of review — strict scrutiny — had been used in *Serrano I*, 18 Cal. 3d at 763-66, 557 P.2d at 549-51, 135 Cal. Rptr. at 365-67.

72. *Id.* at 764, 557 P.2d at 950, 135 Cal. Rptr. at 365.

73. *Id.* at 762, 557 P.2d at 949, 135 Cal. Rptr. at 365.

74. 172 Conn. 615, 376 A.2d 359 (1977).

75. CONN. GEN. STAT. §§ 10-240-41 (1974). The Connecticut system of financing, at the time of *Horton*, consisted largely of flat grants from the state to the local school districts to supplement local property tax revenues. The flat grants were based on average daily attendance of the pupils. CONN. GEN. STAT. § 10-262. The flat grants were supplemented by special grants for exceptional and handicapped students, CONN. GEN. STAT. §§ 10-76a - g, transportation, CONN. GEN. STAT. §§ 10-266, 273A, 277, and other activities. 172 Conn. at ___, 376 A.2d at 374.

76. *Id.* at ___, 376 A.2d at 366. The trial court in its analysis of the Connecticut system of finance had found that, at the time of trial, Connecticut ranked fiftieth among the states in its efforts to equalize the localities' abilities to finance education, forty-seventh in percentage of education funded by state aid and second in percentage of education funding coming from local school districts. *Id.* at ___, 376 A.2d at 369.

77. *Id.* at ___, 376 A.2d at 368.

court concluded that there was a "direct relationship between per pupil school expenditures and the breadth and quality of educational programs."⁷⁸

Before applying equal protection analysis, the court addressed the precedential value of *Rodriguez*. Although conceding that the federal and state equal protection clauses have a like meaning⁷⁹ and that Supreme Court decisions defining the federal constitution are at least very persuasive authority,⁸⁰ the court asserted that "[i]n the area of fundamental civil liberties—which includes all protections of the declaration of rights contained in article first of the Connecticut constitution—we sit as a court of last resort, subject only to the qualification that our interpretations may not restrict the guarantees accorded the national citizenry under the federal charter."⁸¹ In such cases, United States Supreme Court decisions are to be regarded as respectful authority "only when they give no less individual protection than is guaranteed by Connecticut law."⁸²

Accordingly, the court found education to be a fundamental right because of the explicit educational guarantee within the Connecticut Constitution. Subjected to strict judicial scrutiny, the financing system was declared unconstitutional.⁸³

The impact of *Rodriguez*, then, seems to have been minimal. Although the decision may have impeded legislative reform, its impact has been mitigated by its concomitant effect on state equal protection challenges. Indeed, the decision seems to facilitate more cogent state constitutional challenges. This was demonstrated by the court's analysis in *Horton*. Moreover, the rationale of *Serrano* has survived, thus providing an alternate basis for state equal protection claims. The true impact of *Rodriguez*, then, may simply be to channel litigants into state rather than federal forums.

III. THE WISCONSIN FINANCING SYSTEM

Throughout the period of judicial activism in education financing, legislatures have been equally active in attempting to

78. *Id.*

79. 172 Conn. at ___, 376 A.2d at 371.

80. *Id.*

81. *Id.*

82. *Id.*

83. 172 Conn. at ___, 376 A.2d 374.

reform financing systems, resorting to district power equalization (DPE) and full state funding as the "two major alternatives to traditional school financing systems."⁸⁴ Of the eleven states which substantially reformed their school aid programs during the 1972-1973 legislative term, nine, including Wisconsin, enacted programs which "distribute[d] state aid on the basis of district power equalizing formulas."⁸⁵ The failure of DPE to eliminate disparate spending, however, indicates that future judicial intervention or legislative reform has not been obviated.

A. District Power Equalization

The goal of a power equalization system "is to make a district's expenditure level a function only of its taxing effort and not its property wealth."⁸⁶ Theoretically, local expenditure levels are based on the local tax rate chosen by the district.

If local property values are too low to produce the revenues called for under the state's guaranteed expenditure level for the specific tax rate selected, the state would supply the difference. If on the other hand, local wealth were so high that the tax levy produced more than the state guarantee, the state would take the surplus.⁸⁷

Because initiative remains with the local district, local choice is preserved.⁸⁸ DPE proponents saw the retention of local control as its primary advantage over full state funding with statewide taxation.⁸⁹

Although power equalization received strong support, most states did not adopt all of its provisions; the recapture provision — which required property-rich districts to pay into the

84. Note, *State Constitutional Restriction On School Finance Reform: Buse v. Smith*, 90 HARV. L. REV. 1528, 1530 n.15 (1977) [hereinafter cited as *State Constitutional Restrictions*]. See also Michelson, *What Is a "Just" System for Financing Schools?: An Evaluation of Alternative Reforms*, 38 LAW & CONTEMP. PROB. 436 (1974) (favoring full state funding) [hereinafter cited as Michelson].

85. Grubb, *The First Round of Legislative Reforms in the Post-Serrano World*, 38 LAW & CONTEMP. PROB. 459, 463 (1974) [hereinafter cited as Grubb].

86. Levin, *Alternatives*, *supra* note 18, at 919.

87. *Id.* The DPE concept originated in Coons, Clune & Sugarman, *supra* note 6. It was further articulated by the same authors in *Private Wealth and Public Education* (1970).

88. Porter, *supra* note 7, at 206.

89. *State Constitutional Restrictions*, *supra* note 84, at 1530 n.16.

state — was originally adopted only by Wisconsin and Maine.⁹⁰ Maine legislatively deleted the recapture provision.⁹¹ Wisconsin's negative-aid provision was not to become operative until the 1977-1978 legislative years.⁹²

In *Buse v. Smith*,⁹³ a divided Wisconsin Supreme Court

90. Grubb, *supra* note 85, at 465.

91. 1975 Me. Acts, vol. 2, ch. 510, p. 1575. Negative aid was the technical term used for the recapture provision within the Wisconsin legislation. See Wis. STAT. § 121.08(3) (1973).

92. Grubb, *supra* note 85, at 465. As originally conceived, the recapture provision within the Wisconsin school financing system would have forced two types of districts to pay into the state: (1) property-rich districts, which would pay regardless of their costs, and (2) moderately wealthy districts which would be forced to pay if their per-pupil cost exceeded the state ceiling. 74 Wis. 2d 550, 579, 247 N.W.2d 141, 155 (1976). Wisconsin's DPE system is contained within Wis. STAT. ch. 121, especially §§ 121.07-.08 (1975). The Wisconsin power equalizing scheme is extremely complex, and demands close examination. The Wisconsin Supreme Court in *Buse* summarized some general rules about the operation of Wisconsin's negative-aid system. First, there are two basic factors which determine whether a district is a positive-aid district (one which receives aid from the state) or a negative-aid district (one which must pay into the state). 74 Wis. 2d at 559, 247 N.W.2d at 145.

Under this system, if a district's equalized valuation or property wealth was sufficiently low (less than the state secondary valuation), see Wis. STAT. §§ 121.07(b), .08(b), .109(b) (1973), it would always be a positive-aid district regardless of its per-pupil costs. If the district's equalized valuations were slightly higher than above, but still less than the state-set norm (the primary guaranteed valuation per pupil), see Wis. STAT. §§ 121.07(a), .08(a), .09(a) (1972), it would still be a positive-aid district unless its costs were significantly greater than the state ceiling (state shared cost ceilings, see Wis. STAT. § 121.07(6) (1973)).

If the district's equalized valuation equaled the state-set norm (primary guaranteed valuation), it would receive no positive aid, but would be a negative-aid district in proportion to the amount by which its per-pupil costs exceeded the state ceiling. If the district's equalized valuation exceeded the state-set norm, it would always be a negative-aid district regardless of costs. 74 Wis. 2d at 559-60, 247 N.W.2d at 245-46.

A negative-aid district was not precluded from spending above the state ceiling, but could do so only if "it (was) willing to bear the concomitant diversion of part of the additional revenue raised." *State Constitutional Restrictions*, *supra* note 84, at 1531. For a more in-depth analysis of Wisconsin's DPE, see Legislative Fiscal Bureau, State of Wisconsin Elementary and High School Aid Formula (Jan. 1977). See also 43 Wisconsin Taxpayer No. 2, *supra* note 9, at 4-7.

93. 74 Wis. 2d 550, 247 N.W.2d 141 (1976). The court was split 4-3, with a majority opinion written by Justice Connor T. Hansen and joined by Justice Hanley, and a concurring opinion written by Justice Robert S. Hansen and joined by Chief Justice Beilfuss. Although a majority of the court found that the tax was invalid, there was no consensus as to the reason. The majority opinion ruled that the tax was a local versus a state tax, and that it was invalid because it was not expended for a public purpose within the district from which it was raised. 74 Wis. 2d at 579, 247 N.W.2d at 155. The concurring justices opined that the tax was a state tax, but was invalid because not uniformly applied throughout the state. 74 Wis. 2d at 581, 247 N.W.2d at 148 (concurring opinion).

found a conflict between the DPE's negative-aid provision, which was designed to assure an equal educational opportunity for all students within the state,⁹⁴ and article VIII, section 1 of the state constitution, which provides that "[t]he rule of taxation shall be uniform."⁹⁵ The latter clause imposes two limitations on the state's taxing power: (1) the tax must be uniform throughout the area of application⁹⁶ and (2) the tax must be expended for a public purpose in the area from which it is raised.⁹⁷ The first requirement is satisfied so long as similarly situated property is treated similarly within the area of application. The second requirement is met so long as the tax is raised for a public purpose which pertains to the area from which it is raised.⁹⁸

After ruling that the negative-aid tax was a district, as opposed to a state, tax⁹⁹ the *Buse* majority determined that "property-rich districts [did not] have a taxable interest in the education being provided in other school districts in the state."¹⁰⁰ "Regardless of the merits of the legislative enactments or the worthiness of the cause, [the state could not] compel one school district to levy and collect a tax for the direct benefit of other school districts, nor for the sole benefit of the state."¹⁰¹

Since wealthy districts are no longer required to pay negative aid after *Buse*, the equalizing effect of DPE has been somewhat diminished. However, the actual effect of *Buse* may be de minimus since there are relatively "few districts with property wealth above the state-set figure."¹⁰² Although the absence of recapture disturbs the egalitarian spirit of the plan, it probably does little to change the practical operation of school funding in Wisconsin.¹⁰³

94. See WIS. STAT. § 121.01 (1975).

95. WIS. CONST. art. VIII, § 1.

96. 74 Wis. 2d at 581, 247 N.W.2d at 158 (R. Hansen, J., concurring).

97. *State ex rel. New Richmond v. Davidson*, 114 Wis. 563, 90 N.W. 1067 (1902).

98. *State ex rel. Owen v. Donald*, 160 Wis. 21, 151 N.W. 131 (1915).

99. 74 Wis. 2d at 574, 247 N.W.2d at 152.

100. *Id.* at 579, 247 N.W.2d at 155.

101. *Id.*

102. *State Constitutional Restrictions*, *supra* note 84, at 1531.

103. Petitioners in *Buse* alleged in their briefs that negative-aid payments for the 1975-76 school year would constitute only one-half of 1 percent of the total state general school aid. Brief for Petitioner at 6, *Buse v. Smith*, 74 Wis. 2d 550, 247 N.W.2d 141 (1976).

B. Failure of DPE

When DPE was adopted by the Wisconsin legislature it was viewed as the panacea of school finance problems.¹⁰⁴ Yet, even with power equalization, plaintiffs have sought legal redress from maldistribution of educational benefits and tax funds.¹⁰⁵

The difficulty with power equalization may be in its principal source of funds — the local property tax. DPE represents an ardent attempt to equalize school funds; yet this form of state system has not resolved wealth or spending disparities in Wisconsin. In fact, a statewide study reveals that the 1973 revision did nothing to ameliorate the expenditure disparities that predated the new system.¹⁰⁶ Similar circumstances have led one commentator to question “how any local property tax system can satisfactorily overcome financing disparities “to survive rigorous equal protection scrutiny.”¹⁰⁷ The ineluctable conclusion, then, is that DPE must be abrogated, either judicially or legislatively, in favor of a more equitable financing scheme.¹⁰⁸ The Wisconsin milieu for judicial intervention or legislative reform will be the subject of the next section.

IV. WISCONSIN CONSTITUTIONAL CHALLENGES

Empirical studies have demonstrated that educational financing systems which rely heavily on the local property tax invariably contribute to intrastate spending disparities. Arguably, spending disparities can have a deleterious impact on the quality of education in poorer school districts. Courts and legislatures in a number of states have recognized this problem and have responded by invalidating or abrogating property-based financing systems. The Wisconsin system of district power equalization is equally susceptible to this shortcoming. The question remains, however, whether Wisconsin can judicially

104. See generally Coons, Clune & Sugarman, *supra* note 6. See also notes 84-85, *supra* and text accompanying.

105. See text accompanying notes 93-103 *supra*.

106. See generally Hansen, *supra* note 12.

107. Note, *Constitutional Law-School Financing Systems Based on Local Property Taxes Violative of Equal Protection Clause of State Constitution*, Horton v. Meskill, 43 Mo. L. Rev. 322, 330 (1978).

108. A preferable alternative may be full state funding. See, e.g., Michelson, *supra* note 84; Texas School Finance, *supra* note 10. See also Levin, *Alternatives*, *supra* note 18, at 909 n.140.

or legislatively depart from the current reliance on the local property tax.

A. *The Wisconsin Uniformity Clause*

In striking down the negative-aid provision of the Wisconsin DPE system, the court in *Buse* bypassed an opportunity to give the state's "uniform as practicable" clause significant meaning. Instead, the court emphasized the clause's guarantee of "free" education.¹⁰⁹ Free schools were found to be essential to democracy and equality of educational opportunity.¹¹⁰ A more circumspect approach, however, was adopted in construing the meaning of a "uniform" education.

Rather than promulgate an overly broad definition of what is required by the phrase "uniform as practicable," the court in *Buse* merely reiterated the ruling of an earlier decision that the clause concerned the "character of instruction."¹¹¹ By itself, however, this definition is largely meaningless; the inclusiveness of the terminology is impossible to determine. Thus, uniformity seems to contemplate a case-by-case analysis where it is for the "court to ultimately determine what subjects [are] to be included in 'character of instruction.'"¹¹²

Prior to *Buse* the Wisconsin education clause had been construed with respect to two distinct fact situations. In *Iron River Grade School District Number One v. Bayfield County School Committee*,¹¹³ the court considered a challenge to Wisconsin's massive school district reorganization plan, which was designed to equalize both school opportunities and tax burdens.¹¹⁴ In a deliberate attempt to force one school district to attach to another, a county committee initiated a revision of district boundaries, leaving that district with only one-third of its original valuation, but 92 percent of its student population.¹¹⁵

Even though the court conceded that such a revision would make it "financially impossible to continue operating the school system," it refused to intervene, calling the question a

109. Wis. CONST. art. X, § 3.

110. 74 Wis. 2d at 569-70, 247 N.W.2d at 149-50.

111. *Id.* at 566, 247 N.W.2d at 148.

112. *Id.*

113. 31 Wis. 2d 7, 142 N.W.2d 227 (1965).

114. *Id.* at 12, 142 N.W.2d at 229.

115. *Id.* at 11-12, 142 N.W.2d at 228-29.

political one.¹¹⁶ The court has adhered to this noninterventionist position throughout the period of reorganization.¹¹⁷ The uniformity clause does not prevent even the most arbitrary revisions of school boundaries which may deny "a proper education to the children in the remaining district."¹¹⁸ Uniformity applies only to the character of instruction, not to the means by which boundaries are fixed.¹¹⁹

Certainly one of the major reasons for the Wisconsin Supreme Court's refusal to intervene in reorganization was its overall view of reorganization as a positive movement toward tax equalization and equal educational opportunity.¹²⁰ The disturbing aspect of the cases, however, is the court's consistent lack of concern over whether the erosion of a particular district's tax base will affect that district's educational offering.¹²¹ Intrastate valuation disparities still exist among school districts within the state. Redrawing district lines is a means to ameliorate those disparities. This, in turn, would make a local property tax system more equitable. The court, however, has to a significant extent foreclosed judicial intervention in this area.

In *Pacyna v. Board of Education*,¹²² the court ruled that districts must set uniform age admission dates for both kindergarten and first grade children, reasoning that "families in our mobile society who move about within the state should not be confronted with a patchwork of age admission dates for

116. *Id.* at 13, 142 N.W.2d at 229.

117. *See, e.g.,* *Larson v. State Appeal Bd.*, 56 Wis. 2d 823, 202 N.W.2d 920 (1973); *Joint School Dist. v. Sosalla*, 3 Wis. 2d 410, 88 N.W.2d 357 (1958); *Zawerschnick v. Joint City School Comm.*, 271 Wis. 416, 73 N.W.2d 566 (1955). *But cf. State ex rel. Brown v. Hanez*, 190 Wis. 285, 209 N.W. 591 (1926) (uniformity applies to formation of school districts), *overruled, State ex rel. Zilisch v. Aver*, 197 Wis. 284, 221 N.W. 860 (1928).

118. *State ex rel. Grant School Dist. v. School Bd.*, 4 Wis. 2d 499, 510, 91 N.W.2d 219, 225 (1958).

119. *Larson v. State Appeal Bd.*, 56 Wis. 2d 823, 827, 202 N.W.2d 920, 922 (1973). *See also* *Joint School Dist. No. 2 v. State*, 71 Wis. 2d 276, 283-84, 237 N.W.2d 739, 743 (1976) (only question is whether reorganization was arbitrary and capricious).

120. *Iron River Grade School Dist. No. 1 v. Bayfield Co. School Comm.*, 31 Wis. 2d 7, 12, 142 N.W.2d 227, 229 (1965).

121. *Id.* at 16, 142 N.W. at 231. *See also* *Larson v. State Appeal Bd.*, 56 Wis. 2d 823, 828, 202 N.W.2d 920, 922 (1973).

122. 57 Wis. 2d 562, 204 N.W.2d 671 (1973). On age admission standards, *see also* *Zweifel v. Joint Dist. No. 1, Belleville*, 76 Wis. 2d 648, 251 N.W.2d 822 (1977).

school.”¹²³ Carrying this reasoning a step further, it is arguably much more important that “families in our mobile society who move about throughout the state” not be subjected to a “patchwork” of erratic and qualitatively varied educations. The difference, however, is that uniform education requires revision of an entire system of financing whereas uniform age standards can be achieved by only a slight alteration in entrance requirements.

While the disruptive impact of a financing system invalidation may discourage judicial activism, the *Buse* decision suggests an interpretation of *Pacyna* and the uniformity clause which would seem to be sufficiently broad to permit the conclusion that uniform school financing is required by article X, section 3. In discussing *Pacyna* the court equated uniformity with “an equal opportunity to enter public schools.”¹²⁴ At another point the court declared that its prior decisions had construed section 3 as mandating an “equal opportunity for education”¹²⁵ This language suggests that the Wisconsin Supreme Court may be willing to give the clause a broad egalitarian purpose which requires an equitable financing system.

There is other language in *Buse* which could conceivably preclude an education clause challenge to Wisconsin’s financing system. Respondents had argued that the strict dollar equality of negative aid was required by the “uniform as practicable” language of the state education clause.¹²⁶ The court, however, concluded “that the plain meaning of § 3, art. X [did not mandate] absolute uniformity of an equal opportunity for education in all school districts of the state.”¹²⁷ In addition, the court declared that the education clause did not require the equalization of the revenue-raising power of the various districts in the manner prescribed by the negative-aid provision.

A fair reading of *Buse* should not, however, preclude a challenge to the Wisconsin financing system based on the education clause. The question of whether negative aid is required by the education clause, or violates the tax uniformity clause, is inapposite to the question of whether the financing scheme

123. 57 Wis. 2d at 566, 204 N.W.2d at 149.

124. 74 Wis. 2d at 566, 247 N.W.2d at 149.

125. *Id.* at 567, 247 N.W.2d at 149.

126. *Id.* at 565, 247 N.W.2d at 148.

127. *Id.* at 568, 247 N.W.2d at 149.

abrogates the qualitative education guarantee because of wealth and expenditure disparities. Although the *Buse* decision did little to explicate the meaning of Wisconsin's education clause, it does not control the latter question. This conclusion is supported by a more recent Wisconsin decision.

In *Tooley v. O'Connell*,¹²⁸ the court considered whether a complaint which challenged Wisconsin's property tax financing system could withstand demurrer. In finding the complaint sufficient, the court reasoned:

Liberalley construed, the complaint adequately alleges a violation of the Wisconsin constitutional guarantee of the right to equal educational opportunity, alleging that the present system of financing public education (as applied to the Milwaukee school system) is invalid under the several provisions of the Wisconsin Constitution in that the use of the property tax produces an impermissible disparity in the quality of education and thereby denies the children of some of the plaintiffs a right to equal educational opportunities.¹²⁹

This decision, while not on the merits, is a solid indication that the court will entertain a challenge to the state's financing system based on the education clause.

B. Wisconsin Equal Protection

The petitioners in *Buse* alleged that negative-aid legislation violated due process and equal protection. The court summarily rejected the argument that petitioners could assert an equal protection challenge since the wealthy districts did not

128. 77 Wis. 2d 422, 253 N.W.2d 335 (1977). The plaintiffs alleged violations of several provisions of the Wisconsin Constitution, including article X, section 3, the education clause and article I, section 1, the equal protection clause. Two of the allegations in support were that:

(a) The system of financing public education as heretofore set forth relies primarily upon local property tax and, therefore, produces a wide disparity in education expenditure and thereby affords disparate educational facilities throughout the State of Wisconsin and taxes property owners at different rates throughout the State for the same public purpose.

...
(c) The said statutes established a discriminatory tax burden imposed upon owners of real property as distinguished from persons who do not own real property and imposes upon the plaintiffs and all persons like situated who own real property the burden of financial support for the public schools of the City of Milwaukee.

Id. at 430, 253 N.W.2d at 338.

129. *Id.* at 436, 253 N.W.2d at 341.

have a constitutional right to a "better than equal" education.¹³⁰ Most importantly, however, the court recognized "equal opportunity for education" as a fundamental right requiring strict scrutiny. The court reaffirmed earlier rulings that the first section of article I of the Wisconsin Constitution "is substantially the equivalent of the due process and equal protection clauses of the 14th amendment of the U.S. Constitution."¹³¹ However, "[t]he Wisconsin Constitution, unlike the United States Constitution, explicitly commands that the . . . legislature shall provide by law for the establishment of district schools"¹³² Therefore, future school finance plaintiffs asserting a denial of equal protection can expect "strict scrutiny" review.

C. Local Control

The Wisconsin Supreme Court by way of dictum in *Buse* justified its decision by concluding that local districts should be allowed to freely choose to spend more on education without infringement by the state. Section 3 of article X, which denominates "district" schools, and section 4 of article X, which requires that each district raise one-third of the total school revenue provided from the income of the school fund "for the support of the common schools *therein*,"¹³³ served as constitutional bases for the court's reasoning. Local control, therefore, was considered "part and parcel" of the Wisconsin Constitution. As a result of this "constitutional" right, "[l]ocal districts retain the control to provide educational opportunities over and above those required by the state and they retain the power to raise and spend revenue"¹³⁴ for that purpose.

The most disturbing aspect of local control is its necessary dependence on local wealth. For the Wisconsin Supreme Court to say, on the one hand, that local districts retain the power to provide opportunities over and above state-required offerings means, on the other hand, that only those districts wealthy enough to exceed state offerings will have that choice. The

130. 74 Wis. 2d at 580-81, 247 N.W.2d at 155.

131. *Id.* at 579-80, 247 N.W.2d at 155, (citing *Chicago & N.W. Ry., v. LaFollette*, 43 Wis. 2d 631, 169 N.W.2d 441 (1969)).

132. *Id.* at 564, 247 N.W.2d at 147.

133. *Id.* at 570, 247 N.W.2d at 150.

134. *Id.* at 572, 247 N.W.2d at 151.

resulting paradox for poor districts has prompted critics to call local control the "single most important obstacle to education finance reform today."¹³⁵

Others, however, have argued that local control is a "vital" element of educational growth.¹³⁶ For them, it promotes growth because "[e]ach locality is able to tailor programs to local needs. Pluralism also affords some opportunity for experimentation, innovation, and a healthy competition for educational excellence."¹³⁷

The *Buse* decision failed to reconcile these polar positions. While the court found that the uniformity clause required "equal educational opportunity,"¹³⁸ it failed to consider the effect of its promotion of local choice on that right. Under a local tax system, with its dependence on local wealth, only those with the necessary means can make a choice. Thus "equal educational opportunity" is not available to all. Yet, an attempt by Wisconsin to turn from the local property tax and DPE to state funding — the other modern financing alternative — runs squarely into the local funding requirement in article X, section 4.¹³⁹

The language of section four presents a seemingly insurmountable obstacle: "Each town and city shall be required to raise by tax, annually, for the support of the common schools therein, a sum not less than one-half the amount received by such town or city respectively for school purposes from the income of the school fund." It has been generally assumed that the language of the clause requires local districts to raise one-third of all revenue provided by the states for schools.¹⁴⁰ Moreover, this interpretation comports with the apparent intent of the framers of section 4. Experience Estabrook, chairman of the Constitutional Committee on Education and School Funds, gave the following rationale for article X, section 4:

It was intended that whatever the amount of the school fund might be, one-third of the expense of supporting schools,

135. Levin, *Alternatives*, *supra* note 18, at 902.

136. *Wright v. Council of Emperia*, 407 U.S. 451, 478 (1972).

137. *San Antonio Independent School Dist. v. Rodriguez*, 411 U.S. 1, 50 (1973).

138. See text accompanying notes 124-25 *supra*.

139. *State Constitutional Restrictions*, *supra* note 84, at 1538.

140. *Buse v. Smith*, 74 Wis. 2d at 570-71, 247 N.W.2d at 150; *State Constitutional Restrictions*, *supra* note 84, at 1537 n.67.

should be borne by each town. If a sufficient sum was not contributed by the school fund, the towns should have power to raise more. This provision was directly for the advantage of the poor. The gentleman who had last spoken might not appreciate this; but a poor man with a family of children, and no fancy lots to dispose of could understand the advantage. Experience had shown that if nothing was contributed by the town, the common schools languished, and select schools rose on their ruins.¹⁴¹

To maintain local interest, then, localities were to be required to raise one-third of total school funds.

However, a plain reading of the clause today no longer supports that requirement. The clause requires local districts to raise the equivalent of one-third of the revenue received "from the income of the school fund." The school fund is defined in article X, section 2 of the Wisconsin Constitution, as moneys and proceeds from property that may accrue to the state through escheat, forfeiture and the like.¹⁴² Perhaps at the time of enactment of section 4 the income of the school fund was the totality of revenue provided by the state. Today, however, the vast majority of state revenue is provided by legislative alloca-

141. 74 Wis. 2d at 570-71, 247 N.W.2d at 150.

142. Wis. CONST., art. X, § 2, reads:

School fund created; income applied. SECTION 2. The proceeds of all lands that have been or hereafter may be granted by the United States to this state for educational purposes (except the lands heretofore granted for the purposes of a university) and all moneys and the clear proceeds of all property that may accrue to the state by forfeiture or escheat, and all moneys which may be paid as an equivalent for exemption from military duty; and the clear proceeds of all fines collected in the several counties for any breach of the penal laws, and all moneys arising from any grant to the state where the purposes of such grant are not specified, and the five hundred thousand acres of land to which the state is entitled by the provisions of an act of congress, entitled "An act to appropriate the proceeds of the sales of the public lands and to grant pre-emption rights," approved the fourth day of September, one thousand eight hundred and forty-one; and also the five per centum of the net proceeds of the public lands to which the state shall become entitled on her admission into the union (if congress shall consent to such appropriation of the two grants last mentioned) shall be set apart as a separate fund to be called "the school fund," the interest of which and all other revenues derived from the school lands shall be exclusively applied to the following objects, to wit:

1. To the support and maintenance of common schools, in each school district, and the purchase of suitable libraries and apparatus therefor.

2. The residue shall be appropriated to the support and maintenance of academies and normal schools, and suitable libraries and apparatus therefore.

tion from "general purpose revenue," derived from state sales and income taxes and other miscellaneous sources.¹⁴³ In the face of this large legislative allocation, one-third of the income from the school fund is probably *de minimus*. The plain reading of the clause, then, presents no barrier for full state funding.

Even reading the clause, as the *Buse* court apparently did, to require local districts to fund one-third of total educational expenditures, should not impede partial reform. A constitutional requirement of some local funding by article X, section 4 need not prevent greater assumption by the state of school funding.¹⁴⁴

The general fear of local control advocates is that "he who pays the piper calls the tune,"¹⁴⁵ and, if monetary control is not left with local districts, there will be no meaningful ability to tailor local schools to local needs. The local control which provides opportunity for experimentation, innovation and educational excellence would be sacrificed by a move to statewide fiscal control.¹⁴⁶

The fear is largely misdirected. Should greater state funding be the vehicle for reform, a concomitant loss of local control need not occur. In the words of one court: "No matter how the state decides to finance its system of public education, it can still leave this decision-making power in the hands of local

143. General purpose revenues consist of general taxes, miscellaneous receipts and revenues collected by the state agencies which are paid into a specific fund, lose their identity, and are then available for appropriation by the legislature. Wis. STAT. § 20.001(2) (1977). In 1977-78, the allocation to the Department of Public Instruction from general purpose revenue was \$649,093,400. Wis. STAT. § 20.255 (1977).

144. Under the school finance reform of 1973, the State of Wisconsin assumed 40% of the total school expenditures for the state. That was up from the previous state funding of 29%. 43 Wisconsin Taxpayer No. 2, *supra* note 9, at 1. See also Report of Governor's Task Force on Education Financing and Property Tax Reform at 10 (Feb. 1973). See also Wis. STAT. § 121.01 (1977) (purpose of the 1973 legislation is to provide relief from excessive local property tax and to cause greater assumption by state of financing costs).

145. *Texas School Finance*, *supra* note 10, at 270.

146. Statewide fiscal control does not preclude local involvement. As long as state standards guarantee educational quality, individual districts should be allowed to exceed state expenditures if they so choose. See, e.g., *San Antonio Independent School Dist. v. Rodriguez*, 411 U.S. 1, 48 n.102 (1973) (where Court cited with approval change in Hawaii state-funding system of education finance allowing local districts to go "above and beyond" established minimums).

districts.”¹⁴⁷ Localities can still exert effective pressure on their local school administrators to comply with local needs regardless of the ultimate source of revenue.

A reasoned approach questions the need for a monetary club to threaten every administrative decision. The pressure of irate parents certainly can be voiced in a myriad of other imaginable ways. Furthermore, even under a locally-funded school system, it is questionable whether truly interested adults would make good their threat to refuse to fund the local schools that have them so deeply concerned.

V. CONCLUSION

Wisconsin's education financing system is a paradox. The locally-based system of financing education undermines equal access to education — the very goal it is designed to promote.¹⁴⁸ Wisconsin's education clause requires “uniformity” and has been construed to require “equal educational opportunity.” In addition, when read through the state equal protection clause, the education clause means strict scrutiny review for legislation which infringes on the right to education. The education clause applied directly, or through the equal protection clause, provides sufficient weaponry for a court to overturn the present financing system.

For the Wisconsin Supreme Court to do so would require considerable judicial fortitude. The court must overcome a lethargic United States Supreme Court decision. In addition, familiar phrases like “super legislature,” and obstacles like the “cost-quality controversy” and “local control” have caused some courts to declare their own incompetence in deference to the legislative branch. Some state courts, however, have met the challenges necessary to judicial activism in school finance laws. Although not controlling authority in Wisconsin, these cases provide strong examples of judicial intervention.

The importance of judicial involvement cannot be overstated. Traditionally, legislative concern has peaked only when

147. *Serrano v. Priest*, 5 Cal. 3d 584, 610, 487 P.2d 1241, 1260, 96 Cal. Rptr. 601, 620 (1971). Meaningful decisions regarding books, curriculum, teachers and class sizes, can still be made.

148. See WIS. STAT. § 121.01 (1977) (goal of school finance legislation to provide reasonable equality of educational opportunity).

prompted by the courts.¹⁴⁹ The courts are not incompetent, since their only duty is to measure the legislation against a constitutional standard. Regardless of judicial intervention, it is finally for the legislature to comply with judicial dictates.¹⁵⁰

The right at stake is a critical one. Education, unlike any other right, is the source of our ability to understand and fully utilize all of our constitutional rights. For a democratic society to make the quality of education dependent on the fortuity of wealth is both tragic and self-defeating.

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149. See notes 84-85 *supra*, and text accompanying.

150. *Serrano v. Priest*, 18 Cal. 3d 728, 557 P.2d 929, 135 Cal. Rptr. 345 (1976), *cert. denied*, 432 U.S. 907 (1978); *Horton v. Meskill*, 172 Conn. 592, 376 A.2d 359 (1977); *Robinson v. Cahill*, 62 N.J. 473, 303 A.2d 273 (1973), *cert. denied*, 414 U.S. 976 (1975).